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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOSEPH D. RIPPOLONE

Appeal 2009-015057
Application 10/787,429
Technology Center 3600

Before JENNIFER D. BAHR, STEVEN D.A. McCARTHY and
MICHAEL C. ASTORINO, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

1 STATEMENT OF THE CASE

2 The Appellant appeals under 35 U.S.C. § 134 from the Examiner's
3 decision rejecting claims 2, 3, 5-10 and 12-16. More specifically, the
4 Examiner rejects:

5 claims 2 and 12-16 under 35 U.S.C. § 102(b) as being
6 anticipated by Bortugno (US 5,503,219, issued Apr. 2, 1996);

7 claims 3, 5 and 6 under 35 U.S.C. § 103(a) as being
8 unpatentable over Bortugno;

9 claims 7 and 8 under § 103(a) as being unpatentable over
10 Bortugno and Bernardi (US 3,431,972, issued Mar. 11, 1969); and

11 claims 9 and 10 under § 103(a) as being unpatentable over
12 Bortugno, Bernardi and Hamjy (US 2,240,951, issued May 6, 1941).

13 Claims 7, 8 and 12 are independent claims. We have jurisdiction over
14 the appeal under 35 U.S.C. § 6(b).

15 We sustain the rejections of claims 2, 3, 5, 6 and 12-16. We do not
16 sustain the rejections of claims 7-10.

17 Claim 7 is illustrative of the claims on appeal:

18 7. A gutter thawing system section comprising:

19 a first molded gutter section comprising a liquid
20 passage and a first multiple of linear air flow
21 passage adjacent thereto;

22 a second molded gutter section comprising a
23 second multiple of non-linear air flow passages
24 which connect at least two of said first multiple of
25 linear air flow passages; and

26 a third molded gutter section comprising an input
27 connector and a return connector, said input
28 connector in communication with at least one of
29 said first multiple of linear air flow passages, and a

1 said return connector in communication with at
2 least one of said first multiple of linear air flow
3 passages.

4 Claim 8 includes identical recitations to the first and second gutter sections
5 of claim 7. As for the third gutter section of claim 8, the claim recites “a
6 third molded gutter section comprising an input connector and a return
7 connector, said input connector in communication with at least one of said
8 first multiple of linear air flow passages, and said return connector in
9 communication with at least one of said first multiple of linear air flow
10 passages.”

11

12 ISSUES

13 The Appellant argues the rejections of claims 2 and 12-16 as a group.
14 (See App. Br. 4¹; Reply Br. 1-2). Independent claim 12 is representative.
15 The Appellant argues the patentability of claims 2 and 3 under § 103(a)
16 solely on the basis of their dependence from claim 12. (App. Br. 6). The
17 Appellant argues separately for claims 16 (App. Br. 5) and 5 (App. Br. 6-7;
18 Reply Br. 2). The Appellant argues the rejections of claims 7 and 8 as a
19 group. The Appellant argues the patentability of claims 9 and 10 under
20 § 103(a) solely on the basis of their dependence from claim 8. (App. Br. 9).

21 This appeal turns on the following issues.

22 *First*, does Bortugno describe “a gutter wall having a
23 continuous cross section separating the liquid passage and the air flow
24 passage, wherein said gutter wall includes two spaced apart side walls
25 and a bottom wall that define the liquid passage” as recited in claim
26 12? (App. Br. 4; Reply Br. 1-2).

1 *Second*, does Bortugno describe “wherein said air flow passage
2 extends through said solid body and is spaced apart from said
3 continuous upper surface and said continuous lower surface” as
4 recited in claim 16? (App. Br. 5).

5 *Third*, do the evidence and technical reasoning underlying the
6 rejection of claim 5 adequately support the conclusion that the subject
7 matter of the claim would have been obvious? (App. Br. 6-7; Reply
8 Br. 2).

9 *Fourth*, do the evidence and technical reasoning underlying the
10 rejections of claims 7 and 8 adequately support the conclusion that the
11 subject matter of those claims would have been obvious? (App. Br. 7-
12 8; Reply Br. 2-3).

13

14 FINDINGS OF FACTS

15 The record supports the following findings of fact (“FF”) by a
16 preponderance of the evidence.

17 1. We adopt and incorporate by reference the Examiner’s findings in
18 the Answer at page 3, line 16 beginning with “Bortugno discloses” and
19 ending at page 4, line 4 with “bottom wall 23.”); and in the Answer at page 4,
20 line 7 beginning with “[p]er the amendment” and ending at page 4, line 12
21 with “shown in the drawings are continuous.”

22 2. We adopt the Examiner’s findings in the Answer at page 5, lines 8-
23 10, “the gutter wall includes a solid body extending between a continuous
24 upper surface (“C” above, the lip portion) and a continuous lower surface
25 (“D” above).”

1 3. We adopt the Examiner’s findings in the Answer at page 6, lines 1-
2 5, beginning with “the air flow passage extends” and ending with “from the
3 upper and lower surfaces[]).” Additionally, we adopt the Examiner’s
4 findings in the Answer at page 10, line 20 – page 11, line 1 “[a]s shown in
5 attached Figure 5 above, ‘B’ represents the air flow passage and ‘C’
6 represents the upper surface. As shown in the labeling, ‘B’ is spaced from
7 ‘C.’”

8 4. Bortugno does not disclose that the air flow passage within
9 manifold housing 22 is non-linear. (*See generally* Bortugno).

ANALYSIS

12 First, the Appellant points out that claim 12 recites ““a gutter wall
13 having a continuous cross section separating the liquid passage and the air
14 flow passage.”” (Reply Br. 2) (underline in Reply Brief). The Appellant
15 contends that Bortugno does not disclose a “continuous cross section”
16 because Bortugno’s “wall 23 is a distinct and separate piece from the [side]
17 walls 16.” (See App. Br. 4). The Examiner correctly reasons “that members
18 16 and 23 may be separate members has no bearing” (Ans. 10) on whether
19 members 16 and 23 have a continuous cross section. (See Ans. 10). The
20 Examiner is correct: Regardless whether the element 23 is distinct and
21 separate from the side walls 16, the walls 16 and the element 23 combine to
22 form a continuous cross-section. Bortugno’s side walls 16 and element 23
23 function to maintain a liquid passage between side walls 16 and element 23,
24 and an air flow passage within element 23. (See FF 1).

25 *Second*, the Appellant contends “the air flow passage B rests on the
26 continuous upper surface C and is therefore not spaced apart from the

1 continuous upper surface” as recited in claim 16. (App. Br. 5; *see also* App.
2 Br. 6). The Appellant’s contention incorrectly characterizes the Examiner’s
3 findings. The Examiner correctly finds Bortugno’s lip portion “C” of side
4 wall 16 defines a continuous upper surface. (FF 2). The Examiner also
5 correctly finds Bortugno’s lip portion “C” is spaced apart from the air flow
6 passage “B”. (FF 3). Claim 15, from which claim 16 depends, does not
7 prescribe the positions of the recited upper and lower surfaces relative to the
8 structure of the side and bottom walls. In particular, the Appellant points to
9 nothing in either the Specification or in ordinary usage which would
10 preclude the Examiner from construing the term “upper continuous surface”
11 broadly to include a surface at the uppermost tangent of the lip portion “C.”

12 *Third*, claim 5 recites “wherein said air flow passage comprises a
13 multiple of non-linear air flow passages.” Bortugno does not disclose that
14 the air flow passage within the manifold housing 22 is non-linear. (FF 4; *see*
15 Ans. 6). The Examiner concludes it would have been obvious at the time the
16 invention was made to a person having ordinary skill in the art as a matter of
17 design choice for the air flow passage to be non-linear. (*See* App. Br. 6).
18 The Examiner correctly reasons that a non-linear portion can “conform to
19 the structure that the system is being attached.” (Ans. 11). The Appellant
20 contends the Examiner has not provided an evidentiary basis to support his
21 conclusion. (*See* Reply Br. 2). On the contrary, the Examiner’s conclusion
22 of obviousness is persuasive because it is supported by articulated reasoning
23 with rational underpinning.

24 *Fourth*, claims 7 and 8 both include recitations to a first, second, and
25 third gutter section. Each gutter section is unique in that each one has
26 different structural requirements as compared to the others. The Examiner

1 finds “Bortugno discloses a gutter thawing system (Fig. 5) having a gutter
2 section with a liquid passage . . . and an air flow passage . . . and a hot air
3 supply (12) . . . [but not] multiple of air flow passages or a multiple of gutter
4 sections.” (Ans. 7). The Examiner relies on *In re Harza*, 274 F.2d 669
5 (CCPA 1960) to provide reason why one of ordinary skill in the art would
6 have modified Bortugno’s system to duplicate parts. (*Id.*). The Examiner
7 does not analogize the facts in *Harza* to the facts in this appeal.

8 The Appellant contends the “reasoning for duplication of parts does
9 not apply.” (App. Br. 7). In *Harza*, the court held that “[i]t is well settled
10 that the *mere* duplication of parts has no patentable significance.” *Harza* ,
11 274 F.2d at 671 (italics added). The Appellant points out that the three
12 gutter sections recited in claims 7 and 8 “are different and not duplicates.”
13 (*Id.*).

14 The Examiner does not merely duplicate Bortugno’s gutter section to
15 make multiples of that gutter section. The Examiner changes the structure of
16 duplicated gutter sections. Bortugno’s original section lacks a non-linear air
17 flow passage, yet the Examiner modifies a second gutter section to include a
18 non-linear air flow passage. (*See* Ans. 7-8). Then the Examiner must
19 further modify the duplicated second section to connect a first air flow
20 passage in Bortugno’s original section with the duplicated section’s non-
21 linear air flow passage. The Examiner further modifies another duplicated
22 section, a third section, in a different manner. The Examiner modifies the
23 third section via Bernardi’s teaching to include a return connector. (*See*
24 Ans. 8). This modification changes Bortugno’s system from a system
25 without a return to hot-air type furnace 12 to a system with a return to the
26 hot-air type furnace 12. The Examiner does not account for the modification

1 the return to the hot-air type furnace 12 has on Bortugno's exhaust ports 39.
2 (See Reply Br. 2-3). These modifications are far beyond the holding in
3 *Harza*, which is limited to a *mere* duplication of parts.

4 Additionally the Examiner also concludes, “[i]t would have been
5 obvious at the time the invention was made to a person having ordinary skill
6 in the art to use the system in Bernardi . . . with the air flow passage in
7 Bortugno because the systems are functionally equivalent and would
8 perform equally as well.” (Ans. 8). The Examiner’s conclusion of
9 obviousness attributed to functional equivalence between the Bortugno
10 system and Bernardi system does not account for the numerous
11 modifications proposed by the Examiner. As such the reasoning articulated
12 by the Examiner for claims 7 and 8 is not persuasive.

13

14 CONCLUSIONS

15 *First*, Bortugno describes “a gutter wall having a continuous cross
16 section separating the liquid passage and the air flow passage, wherein said
17 gutter wall includes two spaced apart side walls and a bottom wall that
18 define the liquid passage” as recited in claim 12. We sustain the rejection of
19 claims 2 and 12-15 under § 102(b) as being anticipated by Bortugno. We
20 also sustain the rejections of claims 3 and 6 under § 103(a) as being
21 unpatentable over Bortugno.

22 *Second*, Bortugno describes “wherein said air flow passage extends
23 through said solid body and is spaced apart from said continuous upper
24 surface and said continuous lower surface” as recited in claim 16. We
25 sustain the rejection of claim 16 under § 102(b) as being anticipated by
26 Bortugno.

1 *Third*, the evidence and technical reasoning underlying the rejection
2 of claim 5 adequately support the conclusion that the subject matter of the
3 claim would have been obvious. We sustain the rejection of claim 5 under
4 § 103(a) as being unpatentable over Bortugno.

5 *Fourth*, the evidence and technical reasoning underlying the rejections
6 of claims 7 and 8 do not adequately support the conclusion that the subject
7 matter of those claims would have been obvious. We do not sustain the
8 rejection of claims 7 and 8 under § 103(a) as being as being unpatentable
9 over Bortugno and Bernardi. We also do not sustain the rejection of claims
10 9 and 10 under § 103(a) as being unpatentable over Bortugno, Bernardi and
11 Hamjy.

12

DECISION

14 We AFFIRM the Examiner's decision rejecting claims 2, 3, 5, 6 and
15 12-16.

16 We REVERSE the Examiner's decision rejecting claims 7-10.

17 No time period for taking any subsequent action in connection with
18 this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R.
19 § 1.136(a)(1)(iv).

20

AFFIRMED-IN-PART

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24 Klh